YAP SOOI KIM

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
ANUAR ZAINAL ABIDIN J
[CRIMINAL APPLICATION NO. CR 54-7-88]
5 SEPTEMBER 1988

CRIMINAL LAW: *Bail - Applicant charged under s. 39A(2) of the Dangerous Drugs Act 1952 - Offence committed on 29 September 1987 - Bail refused by Sessions Judge pending trial - Whether non-bailable offence - Section 41B(1)(b) of the Act - Distinction between punishment that "can be" imposed and punishment that "may be" imposed - Whether Sessions Judge right in refusing bail.*

The applicant was charged with an offence under s. 39A(2) of the Dangerous Drugs Act 1952 ("the Act"). She applied for bail pending trial but her application was refused by the learned Sessions Judge.

The applicant's Counsel had submitted in support of the application for bail at the High Court that the present offence did not come within the ambit of s. 41B(1)(b) of the Act and that the Sessions Court had erred when it was held that the said offence was non-bailable. It was further submitted by the applicant's Counsel that under s. 41B(1)(b) of the Act, bail should be refused only in cases wherein the punishment is more than 5 years and as the present offence under s. 39A(2) of the Act carries a minimum sentence of only 5 years it can only mean that the applicant may be punished with an imprisonment term of only 5 years and not more. Therefore s. 41B(1) of the Act cannot apply.

Held:

[1] The operative words under s. 41B(1)(b) of the Dangerous Drugs Act 1952 are "punishable with imprisonment" and this phrase means the power of punishment which the Court has under the law and not the punishment which the Court may choose to impose.

[2] As an accused charged with an offence under s. 39A(2) of the Act is liable to an imprisonment term for life (five years being the minimum), it is clear that is an offence within the ambit of s. 41B(1)(b) of the Act.

[3] The learned Sessions Judge was therefore right in refusing bail as the offence under s. 39A(2) of the Act is punishable with imprisonment of more than five years.

[Application dismissed.]

Legislation referred to:
Dangerous Drugs Act 1952, ss. 39A(2), 41B(1)(b)

For the respondent - Tan Poh Lai, DPP
For the applicant - P.G. Segran: M/s. P.G. Segran & Associates

JUDGMENT

Anuar Zainal Abidin J:

This is an application by the applicant for an order that she be granted bail pending trial.

The applicant was arrested on 29 September 1987 at about 10.30 a.m. at her house at No. 286-G, Sentul Pasar, Kuala Lumpur after the police found some drugs in the premises. She was subsequently charged with an offence under s. 39A(2) of the Dangerous Drugs Act 1952 (the Act). On 23 March 1988 she applied for bail pending trial but her application was refused by the learned Judge of the Sessions Court.

In her affidavit in support of the application the applicant stated that the learned Judge of the Sessions Court refused to grant bail as the learned Judge was of the view that an offence under s. 39A(2) of the Act is non-bailable. Such a view, it was submitted by the learned Counsel for the applicant was erroneous. He contended that the present offence is not one which falls within the ambit of s. 41B(1)(b) of the Act, that is the section which relates to bail.

Section 41B(1)(b) reads as follows:

> (1) Bail shall not be granted to an accused person charged with an offence under this Ordinance:
>
> (a) ...
>
> (b) Where the offence is punishable with imprisonment for more than five years; or
>
> (c) ...
>
> (2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary.

It was submitted by the Counsel that under s. 41B(1)(b), bail should be refused only in cases wherein the punishment is more than five years. As the offence under s. 39A(2) of the Act carries a minimum sentence of only five years, Counsel submitted that it can only mean that the accused may be punished with an imprisonment term of only five years and not more. Accordingly, s. 41B(1) cannot apply.

It would appear from Counsel's interpretation of s. 41B(1)(b) that he failed to distinguish between what the punishment that may be imposed and the punishment that can be imposed by the Court. The punishment that may be imposed is the punishment which the Court may decide to impose on the accused after taking into consideration the seriousness of the offence, the antecedent and mitigating factors present. The punishment that a Court can impose relates to the power the Court has. Under s. 39A(2) of the Act, the Court can impose any punishment between a minimum period of five years and an imprisonment for life.

With respect, I think the learned Counsel has misread the provision of s. 41B(1)(b) of the Act when he contended that the restriction on bail does not apply if the accused is sentenced to five years imprisonment. The operative words under this section are "punishable with imprisonment". This phrase means the power of punishment which the Court has under the law and not the punishment which the Court may choose to impose. As an accused charged with an offence under s. 39A(2) of the Act is liable to an imprisonment term for life (five years being the minimum), it is clear that is an offence within the ambit of s. 41B(1)(b) of the Act.

I am therefore of the view the learned Judge of the Sessions Court was therefore right in refusing bail as the offence under s. 39A(2) is punishable with imprisonment of more than five years.

For the above reasons I would dismiss this application.

Also found at [1989] 2 CLJ 242